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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 394

JOHN S. FUNK, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Circuit Court of Appeals, appearing at pages 68–70 of the record, is reported in 66 F. (2d) 70. This opinion refers to the opinion of the Circuit Court of Appeals on a previous appeal (46 F. (2d) 417) for a discussion of the question of the competency of petitioner's wife to testify on his behalf. (See 46 F. (2d) 420–421.)

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 3, 1933 (R. 70). The petition for writ of certiorari was filed August 28, 1933, and was granted October 16, 1933 (R. 71), limited as hereinafter set forth. The jurisdiction of this Court

is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

At the time this Court granted the petition for certiorari it also granted a motion by the petitioner for leave to proceed *in forma pauperis*.

QUESTION PRESENTED

In granting certiorari this Court limited its review "to the question as to what law is applicable to the determination of the competency of the wife of the petitioner as a witness" (R. 71).

The record discloses that the trial court refused to allow the wife to testify on behalf of her husband, who was on trial for conspiracy to violate the National Prohibition Act, or to state, for the purposes of the record, what the substance of her testimony would be if she had been permitted to testify.[1]

STATEMENT

Petitioner, a prohibition agent, together with one Dowdy was indicted in the District Court of the United States for the Middle District of North Car-

[1] The inference from petitioner's brief is that the wife was called to refute or explain the testimony which had been given by a witness for the Government named Martin. Martin was named in the indictment as a coconspirator but was not indicted because, according to the indictment, he was to be used as a witness for the Government (R. 2). Petitioner's brief states that during the course of the trial Martin testified to acts and conversations in the presence of Mrs. Funk, wife of the defendant, and to certain telephone conversations with her. See also the seventh assignment of error below (R. 55).

olina for conspiring to violate the National Prohibition Act (R. 1–7). One Martin was named as a conspirator in the indictment but was not indicted for the reason that, according to the indictment, he was to be used as a witness for the Government (R. 2). Dowdy and the petitioner were both convicted and appealed to the Circuit Court of Appeals for the Fourth Circuit. That court, one judge dissenting without opinion, reversed the convictions of both defendants and ordered the District Court to grant a new trial (46 F. (2d) 417–427). At this second trial the District Court directed the jury to return a verdict of not guilty as to Dowdy (R. 64, 69), but petitioner was again found guilty (R. 64) and was sentenced to imprisonment for a year and a day (R. 64.)

With reference to the question presented for review in this Court the record discloses that after the Government had rested its case at the second trial and a motion for a directed verdict by the petitioner had been denied, the petitioner offered his wife as a witness on his behalf. The Government objected; the objection was sustained, and the petitioner excepted (R. 29). Following this ruling the petitioner insisted that his wife be permitted to state under oath the substance of her testimony for the benefit of the record. This was objected to by the Government; the objection was sustained and an exception noted.[2]

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[2] See footnote 1 as to the purpose for which, according to petitioner's brief, petitioner desired his wife's testimony.

At the first trial the testimony of petitioner's wife was sought both by petitioner and by his co-defendant, Dowdy. The trial court refused to allow the wife to testify at the instance of either defendant, and on appeal this refusal was assigned as error. The Circuit Court of Appeals held, however, that petitioner's wife was not a competent witness for either defendant (46 F. (2d) 420–421).

On the second appeal, the appeal in the instant proceeding, the petitioner again presented to the Circuit Court of Appeals the question whether his wife was competent to testify on his behalf (R. 55). After passing upon another question raised by the petitioner, the court said (R. 69):

> All other assignments of error that are of sufficient merit to warrant discussion were fully considered and, we think, properly passed on in the former decision.

The court consequently rejected petitioner's contention on the basis of its prior opinion.

As the prior opinion was not incorporated in the instant record, we quote the pertinent portion thereof for the convenience of the Court (46 F. (2d) 420–421):

> Both defendants have assigned error to the ruling of the District Court in refusing to permit Mrs. Funk, the wife of the defendant Funk, to testify. Before the defendant Funk rested his case, he called her as a witness on his own behalf, and the court ruled

that she was not competent, and he thereupon excepted to the ruling and rested his case. The defendant Dowdy then called Mrs. Funk as a witness, and the court inquired whether she could testify to anything that was not in behalf of her husband; and Dowdy's attorney thereupon said that it was in defense of her husband as well as of Dowdy. The court thereupon ruled that she was not a competent witness for Dowdy, to which Dowdy excepted.

In the federal courts, the rule has prevailed for many years that in a criminal trial, the wife of a defendant is not a competent witness in his behalf *Jin Fuey Moy* v. *U.S.*, 254 U.S. 189, 41 S.Ct. 98, 65 L.Ed. 214; *Hendrix* v. *U.S.*, 219 U.S. 79, 31 S.Ct. 193, 55 L.Ed. 102; *Barton* v. *U.S.* (C.C.A. 4th), 25 F. (2d) 967; *Fisher* v. *U.S.* (C.C.A. 4th), 32 F. (2d) 602, 604; *Krashowitz* v. *U.S.* (C.C.A. 4th), 282 F. 599.

The federal courts have also held that where two or more defendants are jointly indicted and jointly tried, the wife of one of them is not a competent witness for a codefendant of her husband. *Israel* v. *U.S.* (C.C.A. 6th), 3 F. (2d) 743, 745; *Haddad* v. *U.S.* (C.C.A. 6th), 294 F. 536; *Talbot* v. *U.S.* (C.C.A. 5th), 208 F. 144; *U.S.* v. *Davidson* (D.C.), 285 F. 661.

Certainly, where the testimony of a wife for a codefendant will inure to the benefit of her husband, as was conceded to be the case here, she is not a competent witness. *Israel* v. *U.S., supra.*

It has been very earnestly argued, however, that the decisions of the Supreme Court in the *Jin Fuey Moy* and *Hendrix cases, supra,* are not to be taken as ruling positively that the wife is not a competent witness, in view of the decision of that court in the case of *Rosen* v. *U.S.*, 245 U.S. 467, 38 S.Ct. 148, 62 L.Ed. 406. Our attention is also called to the case of *Rendleman* v. *U.S.* (C.C.A 9th) 18 F. (2d) 27, which holds that a wife is not incompetent to testify in behalf of her husband in a criminal case. It is to be observed that the Supreme Court decision in the *Rosen case* was rendered before the decision in the *Jin Fuey Moy case.* After due consideration, we are of opinion that the Supreme Court has definitely held that a wife is not a competent witness in such cases. This court has consistently followed these decisions and feels bound to observe the rule so long deemed settled, until there is a decision of the Supreme Court to the contrary.

Compare *Tinsley et al.* v. *U.S.* (C.C.A. 8th) 43 F. (2d) 890.

SUMMARY OF ARGUMENT

We contend that the law which is applicable in determining the competency of petitioner's wife to testify as a witness in his behalf is the law of North Carolina as it existed in 1789. *United States* v. *Reid,* 12 How. 361; *Logan* v. *United States,* 144 U.S. 263; *Jin Fuey Moy* v. *United States,* 254 U.S. 189. There is nothing in *Benson* v. *United States,*

146 U.S. 325, or *Rosen* v. *United States,* 245 U.S. 467, which requires a different conclusion.

In 1789 the common law was in force in North Carolina. Under that law petitioner's wife was not a competent witness. Therefore, the trial court did not err in refusing to allow her to testify.

ARGUMENT

We think that "the question as to what law is applicable to the determination of the competency of the wife of the petitioner as a witness" has been conclusively answered by the decisions of this Court in *United States* v. *Reid,* 12 How. 361; *Logan* v. *United States,* 144 U.S. 263, and *Jin Fuey Moy* v. *United States,* 254 U.S. 189.

In the *Reid case* (decided in 1851), Reid and one Clements were jointly indicted in the Circuit Court of the United States for the Eastern District of Virginia for murder committed by them on the high seas on an American ship. By permission of the court the defendants were tried separately, and upon the trial of Reid he proposed to call Clements as a witness on his behalf. The court rejected the testimony, being of the opinion that as Clements was jointly indicted with Reid he was not a competent witness. Reid was found guilty, and the question of the competency of Clements as a witness on Reid's behalf was presented to this Court on a certificate of division of opinion by the judges of the Circuit Court. By a statute of Virginia adopted in 1849 it was

provided "that no person who is not jointly tried with the defendant shall be incompetent to testify in any prosecution by reason of interest in the subject-matter thereof," and the first question considered by this Court was whether this statute was applicable in the case at bar by reason of Section 34 of the Judiciary Act of 1789 (subsequently Section 721 R.S.; U.S.C., Title 28, Sec. 725), which provided "That the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply." This Court held (p. 363):

> The language of this section cannot, upon any fair construction, be extended beyond civil cases at common law, as contradistinguished from suits in equity. So far as concerns rights of property, it is the only rule that could be adopted by the courts of the United States, and the only one that Congress had the power to establish. And the section above quoted was merely intended to confer on the courts of the United States the jurisdiction necessary to enable them to administer the laws of the states. But it could not be supposed, without very plain words to show it, that Congress intended to give to the states the power of prescribing the rules of evidence in trials for offences against the United States. For this construction would in effect place the criminal jurisprudence of

one sovereignty under the control of another. It is evident that such could not be the design of this act of Congress, and that the statute of Virginia was not the law by which the admissibility of Clements as a witness ought to have been decided.

With reference to certain other provisions of the Judiciary Act the Court said (p. 365):

> The Judiciary Act of 1789, § 20, provides for the manner of summoning jurors, and directs that in all cases (of course including criminal as well as civil cases) they shall be designated by lot or otherwise in each state, according to the mode of forming juries therein as then practiced, so far as the law of the state shall render such designation practicable by the courts or marshals of the United States; and that the jurors shall have the same qualifications as were requisite for jurors by the law of the state of which they are citizens, in the highest court of law in the state. Both of these provisions are confined by plain language to the state laws as they then were.
>
> The Crimes Act, as it is usually called, of 1790, § 29, makes some further regulations, which it is not necessary here to specify, in relation to the proceedings and right of peremptory challenge in criminal cases before the jury are impanelled.
>
> But neither of these acts make any express provision concerning the mode of conducting the trial after the jury are sworn. They

> do not prescribe any rule by which it is to be conducted, nor the testimony by which the guilt or innocence of the party is to be determined.

The Court then laid down the rule which we submit is applicable in the instant case. It said (pp. 363, 365) that in the absence of "any act of Congress prescribing in express words the rule by which the courts of the United States are to be governed, in the admission of testimony in criminal cases,"* the law which applies "is the law of the state, as it was when the courts of the United States were established by the Judiciary Act of 1789"; that it must have been the intention of Congress to refer the courts of the United States "to some known and established rule, which was supposed to be so familiar and well understood in the trial by jury that legislation upon the subject would be

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* So far as we can find, the only Federal statutes making the wife of a defendant competent to testify in a criminal proceeding of any kind are Section 1 of the Act of March 3, 1887, c. 397, 24 Stat. 635 (U.S.C., Title 28, Sec. 633), relating to prosecutions for bigamy, polygamy, or unlawful cohabitation, and Section 4 of the Immigration Act of February 5, 1917, c. 29, 39 Stat. 874, 878–879 (U.S.C., Title 8, Sec. 138), relating to prosecutions based upon the importation of aliens for immoral purposes. These statutes obviously have no bearing on the instant case. The crime here involved is a conspiracy to violate the National Prohibition Act.

deemed superfluous" and that "the only known rule upon the subject which can be supposed to have been in the minds of the men who framed these acts of Congress [the Judiciary Act of 1789 and the Crimes Act of 1790], was that which was then in force in the respective states, and which they were accustomed to see in daily and familiar practice in the state courts." The Court then said (pp. 365–366):

> this view of the subject is confirmed by the provisions in the act of 1789, which refers its courts and officers to the laws of the respective states for the qualifications of jurors and the mode of selecting them. And as the courts of the United States were in these respects to be governed by the laws of the several states, it would seem necessarily to follow that the same principles were to prevail throughout the trial: and that they were to be governed in like manner, in the ulterior proceedings after the jury was sworn, where there was no law of Congress to the contrary.
>
> The courts of the United States have uniformly acted upon this construction of these acts of Congress, and it has thus been sanctioned by a practice of sixty years. They refer undoubtedly to English works and English decisions. For the law of evidence in this country, like our other laws, being founded upon the ancient common law of England, the decisions of its courts show

> what is our own law upon the subject where it has not been changed by statute or usage. But the rules of evidence in criminal cases, are the rules which were in force in the respective states when the Judiciary Act of 1789 was passed. Congress may certainly change it whenever they think proper, within the limits prescribed by the Constitution. But no law of a state made since 1789 can affect the mode of proceeding or the rules of evidence in criminal cases: and the testimony of Clements was therefore properly rejected, and furnishes no ground for a new trial.

It is true that in *Rosen* v. *United States*, 245 U.S. 467, 470, a decision which will be discussed later, this Court said that:

> While the decision in *United States* v. *Reid*, *supra*, has not been specifically overruled, its authority must be regarded as seriously shaken by the decisions in *Logan* v. *United States*, 144 U.S. 263–301, and in *Benson* v. *United States*, 146 U.S. 325.

But we think that so far as the question involved in the instant case is concerned, there is nothing in either the *Logan* or the *Benson case* which destroys the applicability of the doctrine announced in the *Reid case*, and that this was definitely recognized by this Court in its decision in *Jin Fuey Moy* v. *United States*, 254 U.S. 189, which was decided after the *Rosen case*.

The *Logan* decision constitutes, we believe, merely a logical extension of the rule announced 40 years before in the *Reid case*. In the *Logan case*, which was decided in 1892, Logan and others were indicted in the District Court of the United States for the Northern District of Texas for conspiracy to injure citizens of the United States in the exercise of a right secured to them by the Constitution and laws of the United States, and for murder committed in the prosecution of the conspiracy. At the trial two witnesses, one who had been convicted of a felony in a State court in North Carolina, and another who had been convicted of a felony in a State court in Texas but who had been pardoned, were permitted to testify for the Government over the objection of the defendants. Following conviction Logan and several codefendants sued out a writ of error from this Court. The plaintiffs in error contended in this Court that the two witnesses who had been previously convicted and sentenced for felony were incompetent under a Texas statute of 1879 (originally enacted in 1858), which they asserted was rendered applicable by virtue of the provision of Section 858 of the Revised Statutes (U.S.C., Title 28, Sec. 631) that, with certain exceptions not material, "the laws of the State in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law, and in equity and admiralty."

A prior statute of the Republic of Texas, which was in force when Texas was admitted into the Union in 1848, contained a provision that "the common law of England, as now practiced and understood, shall, in its application to juries and to evidence, be followed and practised by the courts of this republic, so far as the same may not be inconsistent with this act, or any other law passed by this congress." After referring to its construction in the *Reid case* of the phrase "trials at common law" appearing in Section 34 of the Judiciary Act of 1789 as not including criminal trials, the Court said (p. 301):

> By a familiar rule, the words "trials at common law" in this statute [Sec. 858, R.S.] are to receive the construction which had been judicially given to the same words in the earlier statute relating to the same subject.

The Court then laid down the rule which we think is but a logical extension of the principle which it had announced in the *Reid case* (pp. 302–303):

> For the reasons above stated, the provision of section 858 of the Revised Statutes, that "the laws of the State in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law, and in equity and admiralty," has no application

> to criminal trials;[4] and, therefore, the competency of witnesses in criminal trials in the courts of the United States held within the State of Texas is not governed by a statute of the State which was first enacted in 1858, but, except so far as Congress has made specific provisions upon the subject, is governed by the common law, which, as has been seen, was the law of Texas before the passage of that statute and at the time of the admission of Texas into the Union as a State.

Applying the principles of the common law, the Court held that the witness who had been convicted in North Carolina was not incompetent since conviction in another State did not disqualify and that the witness who had been convicted in Texas was likewise competent because his competency had been restored by a pardon.

Considering the *Reid* and the *Logan cases* together, we think they established a rule which was susceptible of easy and certain application, i.e., in a Federal criminal trial held in one of the thirteen original States the law of that State in force in 1789 applies in determining the competency of a witness, while in the newer States the applicable law is that

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[4] By the Act of June 29, 1906, c. 3608, 34 Stat. 618 (U.S.C., Title 28, Sec. 631), Section 858, R.S., was amended so as to read as follows:

"The competency of a witness to testify in any civil action, suit, or proceeding in the courts of the United States shall be determined by the laws of the State or Territory in which the court is held."

which was in effect when the State was admitted into the Union.

We now come to the *Benson case,* 146 U.S. 325, the other decision referred to in the *Rosen case, supra.* This case was decided in 1892, about seven months after the *Logan case* was decided. We fail to see any inconsistency between the *Benson* decision and the *Reid* and *Logan* decisions. The *Benson case* arose in the District Court of the United States for the District of Kansas. Benson was indicted jointly with one Mary Rautzahn for a murder alleged to have been committed on a military reservation. On motion of the Government a severance was had between the case of Mary Rautzahn and that of Benson. She, not having been tried, was called as a witness on behalf of the Government against Benson, and her testimony was admitted. Benson was convicted and sued out a writ of error from this Court.

The only question decided which has any bearing on the question here presented involved the competency of Mary Rautzahn as a witness for the Government. The Court's approach to the problem before it is peculiarly significant. It immediately turned to the common law (pp. 333–334) and as a result found that while there was a conflict of authority on the question whether a codefendant not on trial may be called as a witness for the prosecution, the preponderance of authority seemed to

favor the admission of such testimony. Why did the Court turn to the common law in passing upon the question before it? Although it did not expressly say in its opinion that it did this because of its decision in the *Logan case* only a few months before, it is important to note that the constitution of Kansas, adopted July 29, 1859, provided that all laws in force in the Territory of Kansas at the time of the acceptance of the State constitution by Congress should continue and remain in full force until they expired or were repealed (Compiled Laws of Kansas, 1862, Sec. 4, p. 70), and that by a statute of the Territory of Kansas enacted February 1859, only five months before the adoption of the State constitution, it was provided, in Section 1, that:

> The common law of England and all statutes and acts of Parliament in aid thereof, made prior to the fourth year of James the First, and which are of a general nature, not local to that kingdom and not repugnant to or inconsistent with the constitution of the United States and the act entitled "an act to organize the Territory of Nebraska and Kansas," or any statute law which may from time to time be made or passed by this or any subsequent Legislative Assembly of the Territory of Kansas, shall be the rule of action and decision in this Territory, any law, custom or usage to the contrary notwithstanding. (Compiled Laws of Kansas, 1862, p. 678.)

The Court then turned to the *Reid case*, which it held not binding for the following reasons (pp. 334–335):

> The precise question in that case was as to the right of the defendant to call his codefendant, and not that of the government to call the codefendant, and a distinction has been recognized between the two cases. It is true that the reasons given for the exclusion of the witness in one are largely the same as those given for his exclusion in the other, to wit, interest and being party to the record; but public policy is also urged in favor of the exclusion of one defendant as a witness for his codefendant, for each would try to swear the other out of the charge. And as the distinction prevailed, whether founded on satisfactory reasons or not, it is sufficient to justify us in holding that that case is not decisive of this. Further, the stress in that case was not on this question. The defendant was indicted and tried in the Circuit Court of the United States for the District of Virginia. A statute had been passed in that State, in terms permitting a codefendant when not jointly tried to testify in favor of the one on trial, and that statute was invoked as securing the competency of the witness, and the question which was discussed was whether the existing statute law of Virginia controlled, and it was held that it did not, and that the question was to be determined by the common law as it stood in Virginia at the date of the Judiciary Act

> of 1789. It was assumed both in this court and in the Circuit Court, 3 Hughes, 509, 539, 540, that by that law the codefendant was incompetent. It was not affirmed that such was the rule in the mother country or in the other States of the Union.

It was only after it had made this approach to its problem that the Court declared (p. 335) that it did not feel itself precluded from examining the question presented "in the light of general authority and sound reason." The Court then referred to the modern tendency "to enlarge the domain of competency and to submit to the jury for their consideration as to the credibility of the witness those matters which heretofore were ruled sufficient to justify his exclusion," a change which, it said, "has been wrought partially by legislation and partially by judicial construction" (p. 336), following which it said (p. 337):

> The spirit of this legislation has controlled the decisions of the courts, and steadily, one by one, the merely technical barriers which excluded witnesses from the stand have been removed, till now it is generally, though perhaps not universally, true that no one is excluded therefrom unless the lips of the originally adverse party are closed by death, or unless some one of those peculiarly confidential relations, *like that of husband and wife,* forbids the breaking of silence. [Italics ours.]

Motivated by the fact that under the legislation to which it referred, "interest and being party

to the record do not exclude a defendant on trial from the witness stand," the Court said in effect that it could see no good reason why a codefendant not on trial should be adjudged incompetent to testify for the Government. It therefore held that the trial court did not err in permitting Mary Rautzahn to testify.

In other words the situation in the *Benson case*, as we view it, was simply that the Court felt at liberty, in view of the conflict of authority as to what the common law was on the subject with which it was concerned to follow that line of decisions which it regarded as more in harmony with the modern rule with reference to testimonial competency. We think it is plainly evident that this Court did not intend in the *Benson case* to overrule what it had held in either the *Reid case* or the *Logan case* as to the proper law governing the determination of the competency of a witness in a Federal criminal case. In fact, although it did not specifically refer in its opinion to the *Logan case*, it certainly followed the technique prescribed in that case in approaching the particular problem of competency before it in the light of the common law, which, it would appear, was the law in force at the time Kansas was admitted into the Union.

The *Benson case* was followed by two decisions of this Court which seem to us to confirm our interpretation of that decision. *Graves* v. *United States*, 150 U.S. 118 (decided in 1893), and *Hendrix* v. *United States*, 219 U.S. 79 (decided in 1911).

In the former case Graves was convicted in the Circuit Court of the United States for the Western District of Arkansas for murder. In his argument to the jury the prosecuting attorney commented on the absence of the defendant's wife from the court room. He said that she should have been sitting by her husband's side during the trial so that witnesses for the Government could see her and identify her as the woman who was said to have been with the defendant when he was seen near the place of the crime. This Court held, however, that as the wife of a person accused of crime was not a competent witness either in his behalf or on behalf of the Government, it was improper for the prosecuting attorney to comment upon the absence of the wife of the defendant.

In the latter case Hendrix was convicted in the District Court of the United States for the Eastern District of Texas of murder. In passing upon the competency of Hendrix's wife to testify in his behalf this Court said (p. 91):

> It is assigned as error that the wife of Hendrix was not allowed to testify in his behalf to certain matters which, it is contended, were "vitally material to his defense." The ruling was not error. *Logan* v. *United States*, 144 U.S. 263.

It is significant that in both cases the basis of the decision was the well-recognized common-law rule that the wife of a defendant in a criminal case may not testify either for or against her husband. There was no attempt in either case to formulate

any new principle more in harmony with the modern trend of removing testimonial disqualifications, and, so far as we can see, the only conceivable reason for citing the *Logan case* in the *Hendrix case* was to call attention to the fact that the rule which settled the question of competency for the Court was the common law as it existed in Texas at the time that State was admitted into the Union. The *Logan case* was not pertinent in the consideration of the question before the Court in any other respect.

We now pass to the *Rosen case,* 245 U.S. 467 (decided in 1918), the case principally relied upon by the petitioner. Briefly, the facts in that case were that Rosen, Wagner, and Broder were indicted in the District Court of the United States for the Eastern District of New York for conspiring to receive stolen mail. Broder pleaded guilty and was called as a witness by the Government. He had previously been convicted and sentenced in a New York State court for forgery. The defendants objected to Broder's competency as a witness, but the objection was overruled and Broder was permitted to testify. The defendants made the contention in this Court that under the *Reid* decision their objection should have been sustained, because by the common law as it was administered in New York in 1789 a person found guilty of forgery and sentenced was thereby rendered incompetent as a witness until pardoned. This Court held, however, two Justices dissenting, that it would not be

bound by the common-law rule of 1789 disqualifying witnesses convicted of crime, but would follow the modern rule, supported both by legislation and the great weight of judicial authority, under which all persons of competent understanding are permitted to testify to relevant facts within their knowledge, leaving to the jury the question of the weight and credibility of such testimony.[5]

However sympathetic one may be with the result reached by this ruling, there are, it seems to us, two things which should be borne in mind in considering this case in connection with the question here presented. The first is the basis of the majority's conclusion that the Court was not bound by the common-law rule of 1789. While the opinion states that although the decision in the *Reid case* "has not been specifically overruled, its authority must be regarded as seriously shaken by the decisions" in the *Logan* and *Benson cases,* there is no specific discussion of the *Logan case.* With reference to the *Benson case,* the opinion states (p. 470):

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[5] *Greer* v. *United States*, 245 U.S. 559, cited by the petitioner, contributes nothing of value in the discussion of the question here involved. While the *Rosen* decision was cited in that case, which was decided twenty-one days after the *Rosen case*, the case did not involve any question of testimonial competency. Furthermore, the statement in the opinion in that case as to the effect of the *Rosen* decision was obviously not only dictum but, we respectfully submit, was manifestly too broad. The *Rosen case* did not deal with the rules of evidence generally, as indicated in the opinion, but merely with the question of the competency of a particular class of witnesses. Cf. *Olmstead* v. *United States*, 277 U.S. 438, 466–469, hereinafter discussed (*infra*, pp. 27–30).

> The *Benson case* differed from the *Reid case* only in that in the former the witness whose competency was objected to was called by the Government while in the latter he was called by the defendant. The testimony of the witness was admitted in the one case but it was rejected in the other, and both judgments were affirmed by this court—however forty years had intervened between the two trials. In the *Benson case*, decided in 1892, this court, after determining that the *Reid case* was not decisive of it, proceeded to examine the question then before it "in the light of general authority and sound reason," and after pointing out the great change in the preceding fifty years in the disposition of courts to hear witnesses rather than to exclude them, a change which was "wrought partially by legislation and partially by judicial construction," and how "the merely technical barriers which excluded witnesses from the stand had been removed," proceeded to dispose of the case quite without reference to the common-law practice, which it was claimed should rule it.

Upon the basis of this analysis of the *Benson case* the majority said that they would accept the authority of that case rather than the *Reid case* and would dispose of the question before them "in the light of general authority and sound reason."

We have heretofore attempted to analyze both the *Logan* and *Benson cases* (*supra*, pp. 13–20), and we respectfully submit that there is at least room for serious doubt that this Court intended in either

case to overturn the doctrine laid down in the *Reid case* that the applicable law for determining the competency of a witness in a criminal case tried in a Federal court situated in one of the thirteen original States was the law of that State as it existed in 1789. Mr. Justice Van Devanter and Mr. Justice McReynolds dissented from so much of the opinion in the *Rosen case* "as departs from the rule settled in *United States* v. *Reid* and *Logan* v. *United States,* which they think is in no way modified by what actually was decided in *Benson* v. *United States.*" 245 U.S. 473.

But perhaps the most important factor to be considered in connection with the *Rosen case* is that the conclusion of the majority that it was not bound by the common-law rule of 1789 was implicitly, if not expressly, limited to the particular disqualification with which the Court was concerned. The opinion states (p. 471):

> Satisfied as we are that the legislation and the very great weight of judicial authority which have developed in support of this modern rule, *especially as applied to the competency of witnesses convicted of crime,* proceed upon sound principle, we conclude that the dead hand of the common-law rule of 1789 should no longer be applied to *such cases as we have here* * * *. [Italics ours.][6]

[6] In the *Rosen case* the Government suggested in its brief certain difficulties in the practical application of the *Reid-Logan* rule in connection with the particular question of

This limitation is particularly important because in the case of *Jin Fuey Moy* v. *United States,* 254 U.S. 189, decided in 1920, only a little over two years after the *Rosen case,* this Court did apply the common-law rule of 1789 when confronted with the question whether a wife of a defendant in a Federal criminal trial in Pennsylvania was competent to testify on his behalf.

In that case, which is clearly decisive of the question presented here, this Court said (p. 195):

> But a single point remains—hardly requiring mention—the refusal to permit defendant's wife to testify in his behalf. It is conceded that she was not a competent witness for all purposes, *a wife's evidence not having been admissible at the time of the first Judiciary Act,* and the relaxation of the rule in this regard by § 858, Rev. Stats., being confined to civil actions. *Logan* v. *United States,* 144 U.S. 263, 299–302; *Hendrix* v. *United States,* 219 U.S. 79, 91. But, it is said, the general rule does not apply to exclude the wife's evidence in the present case because she was offered not "in behalf of her husband," that is, not to prove his innocence, but simply to contradict the testimony of particular witnesses for the Government who had testified to certain matters as having transpired in her presence. The distinction is without substance. The rule that

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competency with which the Court was concerned which do not operate against the use of the rule when applied to the question of competency involved in the instant case.

> excludes a wife from testifying for her husband is based upon her interest in the event, and applies irrespective of the kind of testimony she might give. [Italics ours.]

Subsequent to the decision in the *Jin Fuey Moy* case this Court, in 1928, in *Barton* v. *United States,* 278 U.S. 621, denied an application for certiorari to review a decision of the Circuit Court of Appeals for the Fourth Circuit (25 F. (2d) 967), which held that the wife of a defendant in a Federal criminal trial in South Carolina was not a competent witness on his behalf.

As a further indication that this Court did not intend its decision in the *Rosen case* to abrogate the rule laid down in the *Reid* and *Logan cases,* except in so far as that rule operated to prevent the testimony of the particular class of witnesses there involved, we refer to the recent decision of this Court in *Olmstead* v. *United States,* 277 U.S. 438, decided in 1928. In that case the principal question decided was that "wire tapping" by Government agents did not, under certain circumstances, constitute a search or seizure within the meaning of the Fourth Amendment. This disposed of the only question involved under the terms of the order granting certiorari, but some of the members of the Court, according to the opinion (p. 466), "departing from that order, have concluded that there is merit in the two-fold objection overruled in both courts below that evidence obtained through intercepting of telephone messages by government

agents was inadmissible because the mode of obtaining it was unethical and a misdemeanor under the law of Washington." The Washington statute to which reference was made was enacted in 1909. In passing upon these additional questions this Court said (p. 466–469):

> While a Territory, the English common law prevailed in Washington and thus continued after her admission in 1889. The rules of evidence in criminal cases in courts of the United States sitting there, consequently are those of the common law. *United States* v. *Reid*, 12 How. 361, 363, 366; *Logan* v. *United States*, 144 U.S. 263, 301; *Rosen* v. *United States*, 245 U.S. 467; *Withaup* v. *United States*, 127 Fed. 530, 534; *Robinson* v. *United States*, 292 Fed. 683, 685.
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> The common law rule is that the admissibility of evidence is not affected by the illegality of the means by which it was obtained. * * *
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> * * * * *
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> The rule is supported by many English and American cases cited by Jones in vol. 5, § 2075, note 3, and § 2076, note 6; and by Wigmore, vol. 4, § 2183. It is recognized by this Court in *Adams* v. *New York*, 192 U.S. 585. The *Weeks* case announced an exception to the common law rule by excluding all evidence in the procuring of which government officials took part by methods forbidden by the Fourth and Fifth Amend-

ments. Many state courts do not follow the *Weeks* case. *People* v. *Defore*, 242 N.Y. 13. But those who do, treat it as an exception to the general common law rule and required by constitutional limitations. * * * The common law rule must apply in the case at bar.

Nor can we, without the sanction of congressional enactment, subscribe to the suggestion that the courts have a discretion to exclude evidence, the admission of which is not unconstitutional, because unethically secured. This would be at variance with the common law doctrine generally supported by authority. * * *

* * * In the absence of controlling legislation by Congress, those who realize the difficulties in bringing offenders to justice may well deem it wise that the exclusion of evidence should be confined to cases where rights under the Constitution would be violated by admitting it.

* * * * *

This statute does not declare that evidence obtained by such interception shall be inadmissible, and by the common law, already referred to, it would not be. *People* v. *McDonald*, 177 App. Div. (N.Y.) 806. Whether the State of Washington may prosecute and punish federal officers violating this law and those whose messages were intercepted may sue them civilly is not before us. But clearly a statute, passed twenty years after the admission of the State into the Union cannot

affect the rules of evidence applicable in courts of the United States in criminal cases. Chief Justice Taney, in *United States* v. *Reid*, 12 How. 361, 363, construing the 34th section of the Judiciary Act, said:

"But it could not be supposed, without very plain words to show it, that Congress intended to give the states the power of prescribing the rules of evidence in trials for offenses against the United States. For this construction would place the criminal jurisprudence of one sovereignty under the control of another." See also *Withaup* v. *United States*, 127 Fed. 530, 534.

In view of the decisions of this Court in the *Reid*, *Logan* and *Jin Fuey Moy cases* we submit that the law applicable in determining the competency of the wife of the petitioner as a witness on his behalf is the law as it existed in the State of North Carolina in 1789. At that time the common law was in force in North Carolina. *Brown* v. *United States*, 233 Fed. 353, 354 (C.C.A. 6th). According to Blackstone, who wrote in 1765 (1 Bl. Com., Lewis ed., 443), the rule of the common law with reference to the competency of a wife as a witness either for or against her husband was as follows:

In criminal prosecutions, it is true, the wife may be indicted and punished separately; for the union is only a civil union. But in trials of any sort they are not allowed to be witnesses *for*, or against, each other; partly because it is impossible their testi-

> mony should be indifferent, but principally because of the union of person; and therefore, if they were admitted to be witnesses for each other, they would contradict one maxim of law, *"nemo in propria causa testis esse debet"*; and if *against* each other, they would contradict another maxim, *"nemo tenetur seipsum accusare."* But, where the offence is directly against the person of the wife, this rule has been usually dispensed with * * * .

See also *Stein* v. *Bowman,* 13 Pet. 209, 221; *Lucas* v. *Brooks,* 18 Wall. 436, 452–453; *Bassett* v. *United States,* 137 U.S. 496, 505; *Hopkins* v. *Grimshaw,* 165 U.S. 342, 349; *Powell* v. *Strickland,* 163 N.C. 393, 395.

The trial court properly ruled, therefore, that the petitioner's wife was not a competent witness. Under the *Reid* and *Logan cases,* it was not required to apply the provision of the existing State statute under which the wife would have been competent to testify. (Sec. 1802, North Carolina Code of 1931.) This provision did not originate until 1881. (Laws of North Carolina, 1881, c. 110.)

Finally, we wish to point out that except for the *Rosen case* we have found no instance in which a testimonial disqualification of the common law has been removed other than by Act of Congress. Examples of the practice in this respect are given in the *Benson* and *Rosen* decisions. (See also Wigmore on Evidence, 2d ed., Vol. I, § 488, note, p. 869, listing the Federal statutes.)

We have not discussed the cases in the lower Federal courts bearing upon the question presented, as we think they tend to confuse rather than to aid in the solution of the question here involved. We have, however, given a summary of those cases in the appendix hereto, pages 33–36, *infra*.

CONCLUSION

We respectfully submit that the judgment below should be affirmed.

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NOVEMBER 1933.

APPENDIX

CASES IN LOWER FEDERAL COURTS

The following Federal criminal cases hold that a wife is incompetent as a witness for her husband:

United States v. *Jones*, 32 Fed. 569 (1887), D.C.S.C.

Wesoky v. *United States*, 175 Fed. 333 (1910), C.C.A. 3d.

Fitter v. *United States*, 258 Fed. 567 (1919), C.C.A. 2d.

Lowe v. *United States*, 282 Fed. 597 (1922), C.C.A. 9th.

Krashowitz v. *United States*, 282 Fed. 599 (1922), C.C.A. 4th.

Slick v. *United States*, 1 F. (2d) 897 (1924), C.C.A. 7th.

Allen v. *United States*, 4 F. (2d) 688 (1925), C.C.A. 7th.

Fasulo v. *United States*, 7 F. (2d) 961 (1925), C.C.A. 9th, reversed on other grounds, 272 U.S. 620.

Liberato v. *United States*, 13 F. (2d) 564 (1926), C.C.A. 9th.

Barton v. *United States*, 25 F. (2d) 967 (1928), C.C.A. 4th, certiorari denied, 278 U.S. 621.

Fisher v. *United States*, 32 F. (2d) 602 (1929), C.C.A. 4th.

The following Federal criminal case holds that a wife is an incompetent witness for the Government against her husband even where the offense was against her:

Johnson v. *United States*, 221 Fed. 250 (1915) C.C.A. 8th.

The following Federal criminal cases hold that a wife is a competent witness for the Government against her husband on the theory that the offense was against her person:

United States v. *Rispoli*, 189 Fed. 271 (1911), D.C.E.D.Pa.

Cohen v. *United States*, 214 Fed. 23 (1914), C.C.A. 9th, certiorari denied, 235 U.S. 696.

Pappas v. *United States*, 241 Fed. 665 (1917), C.C.A. 9th.

Denning v. *United States*, 247 Fed. 463 (1918), C.C.A. 5th.

Kerr v. *United States*, 11 F. (2d) 227 (1926), C.C.A. 9th, certiorari denied, 271 U.S. 689.

The following case holds that the wife is competent to testify for her husband, applying the rule in the *Logan case*, in that she was not incompetent by the law of Washington when it was admitted as a State:

Rendleman v. *United States*, 18 F. (2d) 27 (1927), C.C.A. 9th.

In the following cases the wife of a codefendant was under the circumstances deemed competent:

O'Brien v. *United States*, 299 Fed. 568 (1924), C.C.A. 8th.

Tinsley v. *United States*, 43 F. (2d) 890 (1930), C.C.A. 8th.

Parnell v. *United States*, 64 F. (2d) 324 (1932), C.C.A. 10th.

In the following cases the wife of the codefendant was held not competent:

Talbott v. *United States*, 208 Fed. 144 (1913), C.C.A. 5th, certiorari denied, 232 U.S. 722.

United States v. *Davidson,* 285 Fed. 661 (1922), D.C.E.D.Pa.
Haddad v. *United States,* 294 Fed. 536 (1923), C.C.A. 6th.
United States v. *Liddy,* 2 F. (2d) 60 (1924), D.C.E.D.Pa.
Israel v. *United States,* 3 F. (2d) 743 (1925), C.C.A. 6th.

The following cases, arising in States other than the thirteen original States, applied the rule of the *Logan case* as to the competency of witnesses in Federal criminal cases, i.e., the law as of the time of the State's admission to the Union:

Withaup v. *United States,* 127 Fed. 530 (1903), C.C.A. 8th.
Maxey v. *United States,* 207 Fed. 327 (1913), C.C.A. 8th.
Ding v. *United States,* 247 Fed. 12 (1918), C.C.A. 9th.
McCoy v. *United States,* 247 Fed. 861 (1918), C.C.A. 5th.
Neal v. *United States,* 1 F. (2d) 637 (1924), C.C.A. 8th.

Each of the following Federal criminal cases, arising in one of the thirteen original States, applied the rule of the *Reid case* upon the general question of competency:

United States v. *Hughes,* 175 Fed. 238 (1892), D.C.W.D.Pa.
United States v. *Hall,* 53 Fed. 352 (1892), D.C.W.D.Pa.
Scaffidi v. *United States,* 37 Fed. (2d) 203 (1930), C.C.A. 1st.

The following Federal criminal cases follow the rule of the *Rosen case* as to competency of those previously convicted:

Safford v. *United States,* 252 Fed. 471 (1918), C.C.A. 2d.

Manuel v. *United States,* 254 Fed. 272 (1918), C.C.A. 8th.

Ammerman v. *United States,* 267 Fed. 136 (1920), C.C.A. 8th, certiorari denied, 254 U.S. 650.

Peace v. *United States,* 278 Fed. 180 (1921), C.C.A. 7th.

Solomon v. *United States,* 297 Fed. 82 (1924), C.C.A. 1st.

Hurwitz v. *United States,* 299 Fed. 449 (1924), C.C.A. 8th, certiorari denied, 266 U.S. 613.

McCormick v. *United States,* 9 F. (2d) 237 (1925), C.C.A. 8th.

Hagan v. *United States,* 9 F. (2d) 562 (1925), C.C.A. 8th.

Chapman v. *United States,* 10 F. (2d) 124 (1926), C.C.A. 5th, certiorari denied, 271 U.S. 667.

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